Panglima Tentera Laut Diraja Malaysia & Ors v Simathari a/l Somenaidu

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01 (f)-17–07 OF 2014 (W)
ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), RAMLY ALI, ZAHARAH IBRAHIM FFCJ AND BALIA YUSOF JCA
10 JANUARY 2017

Administrative Law — Judicial review — Application for — Decision approving termination of appellant as member of Royal Malaysian Navy — Appellant terminated from service under Queen's Regulations — Whether Queen's Regulations still had force of law — Whether Queen's Regulations were saved when Navy Ordinance was repealed by the Armed Forces Act ('the Act') — Whether applicability of Queen's Regulations saved by s 217(2) of the Act — Whether omission of words 'or applied by' in s 217(2) of the Act had not detracted from clear intention of Parliament to save all subsidiary legislation in force as at date of coming into force of the Act — Whether continued application of Queen's Regulations preserved by s 33 of the Interpretation Acts 1948 and 1967

Statutory Interpretation — Interpretation — Literal rule — Plain and ordinary meaning — Whether literal interpretation would lead to absurd consequence — Whether purposive approach preferred

Simathari a/l Somenaidu ('the respondent'), a non-commissioned serviceman with the Royal Malaysia Navy ('the Navy'), had been accused of a crime relating to flight warrants. The respondent's commanding officer ('the third appellant') had ordered him to sign a dismissal form admitting to the alleged crime. When the respondent refused to do so, he was found guilty of insubordination under the Armed Forces Act 1972 ('the Act') and punished with a sentence of suspension of leave and a warning. Subsequently, based on the same finding of insubordination the first appellant had instructed the third appellant to initiate the process for the respondent to be terminated from service under the Queen's Regulations for the Royal Navy ('the Queen's Regulations'). The third appellant acted accordingly and the first appellant approved the respondent's termination as a member of the Navy under the Queen's Regulations. The aggrieved respondent filed an application for the judicial review of the first appellant's decision to terminate him as a serviceman in the Navy. It was the respondent's case that the Queen's Regulations had been applied to the officers of the Navy by virtue of the Navy Ordinance 1958 ('the Ordinance') and that with the repeal of the Ordinance by s 217(1) of the Act, the said Regulations

could not be relied upon to terminate the appellant's services with the Navy. The trial judge found that the applicability of the Queen's Regulations was saved by s 217(2) of the Act. Hence the High Court dismissed the respondent's application. The respondent appealed to the Court of Appeal, which, by a majority, allowed the appeal. This was the appellants' appeal against the decision of the Court of Appeal. The appellants had obtained leave to proceed with the instant appeal which was primarily concerned with only one issue, namely whether the Queen's Regulations were saved when the Navy Ordinance was repealed by the Armed Forces Act ('the Act'). The appellants argued that by virtue of ss 30 and 33 of the Interpretation Acts 1948 and 1967 ('Act 388'), the repeal of the Navy Ordinance by the Act did not affect the continued operation of the Queen's Regulations, which were written law applied by the Navy Ordinance. The respondent maintained that since the Queen's Regulations were punitive in nature, in that they provided, inter alia, for the termination of service of members of the Navy, the words in s 217(2) of the Act should be given a strict construction such that only regulations 'made under' the Ordinance and not 'applied under' the Ordinance were saved.

Held, allowing the appeal:

(1) Section 217(2) of the Act should be read in the light of the other provisions of the Act and the Navy Ordinance, as well as the reasons why the Queen's Regulations were made applicable to the Navy. At the time of the drafting of s 217(2) of the Act it was obvious that the only regulations in place in relation to the termination of the Navy servicemen were the Queen's Regulations and the fact that the Queen's Regulations were regulations applied to the Navy by s 10 of the Navy Ordinance but not made or deemed to have been made under the Ordinance had been overlooked. In the circumstances, to interpret s 217(2) of the Act in a strictly literal manner would lead to the absurd consequence that a naval serviceman, could not at the material time be terminated from service except in pursuance of a sentence by a court-martial. As such, the view of the minority in the Court of Appeal that a purposive approach ought to be used as without the Queen's Regulations there would be no regulations in place to deal with the termination of non-commissioned servicemen whose service was no longer required, would be preferred (see paras 39, 51, 56–58 & 80).

(2) The omission of the words 'or applied by' in s 217(2) of the Act did not detract from the clear intention of Parliament to save all subsidiary legislation in force as at the date of the coming into force of the Act so long as the legislation was not inconsistent with the provisions of the Act (see para 66).

(3) The Queen's Regulations were written law within the meaning of that term as defined in s 3 of Act 388.The provisions of s 30(2)(a)(ii) of

Act 388 clearly showed that upon the repeal of the Naval Ordinance, the continued operation of the Queen's Regulations was not prejudicially affected. When the problem of the specific saving provision in s 217(2) of the Act arose, s 33 of Act 388 ought to come into play. Section 33 of Act 388 made it clear that the specific savings provisions in the written law, which in this context was the Armed Forces Act 1972, should be 'without prejudice to the application of ss 28, 29, 30, 31 and 32 in respect of that law'. Therefore, despite the Queen's Regulations not being mentioned in the specific savings provisions in s 217(2) of the Act, the continued application of the Queen's Regulations was preserved by virtue of s 33 of Act 388 (see paras 73–74, 76 & 79).

[Bahasa Malaysia summary

Simathari a/l Somenaidu ('responden'), askar tidak bertauliah dengan Tentera Laut Diraja Malaysia ('tentera laut'), telah dituduh dengan jenayah berkaitan waran penerbangan. Pegawai pemerintah responden ('perayu ketiga') telah mengarahkannya untuk menandatangani satu borang pemecatan mengakui jenayah yang didakwa. Apabila responden enggan untuk berbuat demikian, dia didapati bersalah atas keingkaran di bawah Akta Angkatan Tentera 1972 ('Akta') dan dihukum dengan hukuman penggantungan cuti dan amaran. Berikutan itu, berdasarkan dapatan yang sama terhadap keingkaran perayu pertama telah mengarahkan perayu ketiga untuk memulakan proses untuk responden diberhentikan daripada perkhidmatan di bawah Peraturan Queen untuk Tentera Laut Diraja ('Peraturan Queen'). Perayu ketiga bertindak sewajarnya dan perayu pertama mengesahkan penamatan perayu sebagai ahli Tentera Laut di bawah Peraturan Queen. Responden terkilan memfailkan permohonan untuk semakan kehakiman terhadap keputusan perayu pertama untuk menamatkannya sebagai askar dalam Tentera Laut. Adalah kes responden bahawa Peraturan Queen telah digunapakai dalam Tentera Laut menurut Ordinan Tentera Laut 1958 ('Ordinan') dan bahawa dengan pemansuhan Ordinan oleh s 217(1) Akta, peraturan tersebut tidak boleh digunakan untuk menamatkan perkhidmatan perayu dengan Tentera Laut. Hakim perbicaraan mendapati kebolehgunaan Peraturan Queen telah diselamatkan oleh s 217(2) Akta. Maka Mahkamah Tinggi menolak permohonan responden. Responden merayu ke Mahkamah Rayuan, dengan majoriti, membenarkan rayuan. Ini adalah rayuan perayu terhadap keputusan Mahkamah Rayuan. Perayu telah mendapatkan permohonan untuk meneruskan dengan rayuan ini yang mana khususnya berkaitan dengan hanya satu isu, iaitu sama ada Peraturan Queen diselamatkan apabila Ordinan Tentera Laut dimansuhkan oleh Akta Angkatan Tentera ('Akta'). Perayu menghujahkan bahawa menurut ss 30 dan 33 Akta Intepretasi 1948 dan 1967 ('Akta 388'), Ordinan Tentera Laut yang dimansuhkan oleh Akta tidak menjejaskan operasi berterusan Peraturan Queen, yang mana undang-undang bertulis yang digunapakai oleh Ordinan Tentera Laut. Responden mengekalkan bahawa memandangkan Peraturan Queen bersifat punitif, dalam

hal itu mereka memperuntukkan, antara lain, untuk penamatan perkhidmatan ahli Tentera Laut, perkataan dalam s 217(2) Akta seharusnya diberikan tegas perlembagaan supaya hanya peraturan 'made under' Peraturan dan tidak 'applied under' Ordinan telah diselamatkan.

Diputuskan, membenarkan rayuan:

(1) Seksyen 217(2) Akta sepatutnya dibaca dengan mengambil kira peruntukan lain Akta dan Ordinan Tentera Laut, dan juga sebab mengapa Peraturan Queen dibuat terpakai kepada tentera laut. Sewaktu membuat draf s 217(2) Akta adalah nyata bahawa satu-satunya peraturan menggantikan berhubung dengan penamatan anggota perkhidmatan Tentera Laut adalah Peraturan Queen dan hakikat bahawa Peraturan Queen adalah peraturan yang digunakan kepada Tentera Laut oleh s 10 Ordinan Tentera Laut tetapi tidak dibuat atau disifatkan telah dibuat di bawah Ordinan telah diabaikan. Dalam keadaan ini, untuk mentafsirkan s 217(2) Akta secara literal akan membawa kepada akibat tidak masuk akal bahawa askar tentera laut, tidak boleh pada masa material ditamatkan daripada perkhidmatan kecuali menurut hukuman oleh mahkamah tentera. Dengan demikian, pandangan minoriti dalam Mahkamah Rayuan bahawa pendekatan tujuan sepatutnya digunakan kerana tanpa Peraturan Queen tidak akan ada peraturan-peraturan sedia ada untuk menguruskan penamatan pegawai tidak bertauliah yang perkhidmatannya tidak lagi diperlukan, tetapi akan diutamakan (lihat perenggan 39, 51, 56–58 & 80).

(2) Peninggalan perkataan 'or applied by' dalam s 217(2) Akta tidak menyimpang dari niat jelas Parlimen untuk menyelamatkan semua perundangan subsidiari yang berkuat kuasa pada tarikh mula berkuat kuasanya Akta selagi undang-undang selaras dengan peruntukan Akta (lihat perenggan 66).

(3) Peraturan Queen adalah undang-undang bertulis terangkum dalam erti terma seperti yang ditafsirkan dalam s 3 Akta 388. Peruntukan s 30(2)(a)(ii) Akta 388 jelas menunjukkan bahawa setelah pemansuhan Ordinan Tentera Laut, operasi berterusan Peraturan Queen tidak terjejas. Apabila masalah dalam peruntukan kecualian tertentu dalam s 217(2) Akta timbul, s 33 Akta 388 sepatutnya digunakan. Seksyen 33 Akta 388 menyatakan dengan jelas bahawa peruntukan kecualian tertentu dalam undang-undang bertulis, yang mana dalam konteks ini adalah Akta Angkatan Tenteta 1972, sepatutnya 'without prejudice to the application of ss 28, 29, 30, 31 and 32 in respect of that law'. Oleh itu, meskipun Peraturan Queen tidak disebut dalam peruntukan kecualian tertentu dalam s 217(2) Akta, penerapan berterusan Peraturan Queen dipelihara menurut s 33 Akta 388 (lihat perenggan 73–74, 76 & 79).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 312–342.

For cases on interpretation in general, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2152–2240.

Cases referred to

CCM Industrial Pte Ltd v Uniquetech Pte Ltd [2009] 2 SLR 20, HC (refd)

Corocraft Ltd and another v Pan American Airways Inc [1968] 2 All ER 1059, QBD (refd)

Md Redzuan Alang lwn Panglima Tentera Laut & satu lagi [2011] 1 CLJ 656, HC (refd)

PP v Viran [1947] 1 MLJ 62 (refd)

Swan v Pure Ice Company, Limited [1935] 2 KB 265, CA (refd)

Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors [2007] 3 MLJ 305; [2007] 3 CLJ 230, CA (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001

Arms Enactment of the Federated Malay States (Cap 199) (repealed by Arms Act 1960)

Armed Forces (Terms of Service of Regular Forces) Regulations 2013 reg 68

Armed Forces Act 1972 ss 28(3), 36, 49, 49(b), 90, 217, 217(2), Part V

Army and Air Force (Terms of Service) Regulations 1961

Explosives Enactment of the Federated Malay States (Cap 200) (repealed by Explosives Act 1957)

Firearms and Ammunition (Unlawful Possession) Ordinance 1946 s 3

Interpretation Acts 1948 and 1967 ss 2, 3, 17A, 30, 30(2)(a)(ii), 33, Part I

Navy Ordinance 1958 ss 10, 16 Schedule

Queen's Regulations For the Royal Navy Revised 1967 [UK] art 877

Rules of Court [SG] O 22A rr 9(5), 12

Appeal from: Civil Appeal No W-01–495–11 of 2012 (Court of Appeal, Putrajaya)

Shamsul Bolhassan (Shahroni Sanusi with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

Yudistra Darma Dorai (Elizabeth Goh Huay Ling with him) (Raj, Ong & Yudistra) for the respondent.

Zaharah Ibrahim FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal which allowed the respondent's appeal against the decision of the High Court dismissing the respondent's application for judicial review to quash the decision to terminate the respondent's service as a serviceman in the Royal Malaysian Navy ('the Navy').

BACKGROUND FACTS

[2] The undisputed facts of this case are as set out below.

[3] The respondent was a non-commissioned serviceman with the Navy. He was charged under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 for allegedly misusing flight warrants.

[4] The Navy decided to terminate his service. By letter dated 3 March 2011 written on behalf of the first appellant, the third appellant, as the commanding officer of KD Sri Gombak where the respondent was attached, was directed to submit an application for the respondent's termination from service, together with his service documents, for further action.

[5] The third appellant asked the respondent to complete the 'BAT B 83 (Pemberhentian)' form but the respondent refused to do so.

[6] As a result of the respondent's refusal, the respondent was charged with insubordination under para 49(b) of the Armed Forces Act 1972 ('the Armed Forces Act').

[7] The respondent was found guilty of the charge against him and was penalised with the sentence of 'tahanan cuti 28 hari' and was also given a warning.

[8] Based on the same finding of insubordination, the first appellant instructed the third appellant to initiate termination proceedings against the respondent under art 877 of the Queen's Regulations For the Royal Navy Revised 1967 ('the QRRN') on the ground that his service was no longer required.

[9] The QRRN were among the statutes made applicable to the Navy by s 10 of the Navy Ordinance 1958 ('the Navy Ordinance').

[10] The proceedings resulted in the respondent's termination from service with effect from 29 March 2012.

AT THE HIGH COURT

[11] On 4 May 2012, the respondent applied for leave to commence judicial review proceedings against the decision to terminate his service under the QRRN. Leave was granted on 27 June 2012.

[12] On 2 October 2012 the High Court dismissed the respondent's application for judicial review of the decision to terminate his service under the QRRN.

ISSUES BEFORE THE HIGH COURT

[13] The central issue before the High Court was whether the QRRN were still valid and applicable to non-commissioned servicemen of the Navy at the time of the respondent's termination from service.

[14] The respondent contended that the QRRN were no longer applicable by virtue of the repeal of the Navy Ordinance by the Armed Forces Act. The respondent submitted that s 217(2) of the Armed Forces Act did not save the QRRN. The case of *Md Redzuan Alang lwn Panglima Tentera Laut & satu lagi* [2011] 1 CLJ 656 was cited in support of that submission. In *Md Redzuan,* the High Court held that the QRRN were not saved as they were not *made* under the repealed Navy Ordinance.

[15] For the appellants it was argued in the High Court that as the QRRN were not specifically repealed under s 217(2) of the Armed Forces Act, the QRRN remained in force. According to the appellants, the provisions of s 217(2) of the Armed Forces Act made it clear that any regulation made or made applicable under the Ordinances repealed under s 217(1) continued to have force and be applicable so long as the regulation is not inconsistent with the provisions of the Armed Forces Act, until replaced under the Act.

[16] It was the appellants' contention that the Navy had not adopted or applied the Army and Air Force (Terms of Service) Regulations 1961 and thus no new provision had been made under the Armed Forces Act in respect of the Navy. Therefore until and unless specific regulations were made for the Navy or for all three branches of the armed forces, the QRRN were still applicable to the Navy.

[17] It was also the appellants' contention that the fact that the Armed Forces Council had, in its meeting No 366 on 31 March 1998, approved the

application of the QRRN showed that the QRRN remained applicable law at the material time.

THE HIGH COURT DECISION

[18] The learned High Court judge agreed with the appellants' contention, and disagreed with the decision in *Md Redzuan Alang*. Her Ladyship's view on this point as set out in her oral decision is reproduced below:

> [11] First, in my considered view, even though technically speaking QRRN was not enacted under the Navy Ordinance, it was applied by virtue of s 10 of the said Ordinance and was applicable to the British Royal Navy as well as the Malaysian Navy. In my view the fact that the QRRN was applied by virtue of the Navy Ordinance then, it is as good as it is made under the Ordinance and hence s 217(2) applies. In my view even though under s 217(2) QRRN was not made under the Navy Ordinances it was applied under the said Ordinances, all the same.
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> [12] More importantly to my mind the Regulations was not specifically repealed under s 217(2). QRRN was not specifically repealed under s 217 to render it unenforceable. Hence, it is saved by this provision. Contrary to it being repealed in fact, the Armed Forces Council in its meeting no 366 on 31 March 1998 had approved the application of QRRN. This would fortify further that QRRN have not been specifically repealed as envisaged by s 217(2) of the AFA, and hence would remain enforceable.

[19] The secondary issue before the High Court was whether the termination of the respondent under the QRRN on the same factual basis as the charge for insubordination under s 49 of the Armed Forces Act amounted to double jeopardy.

[20] The learned High Court judge did not agree that the respondent suffered double jeopardy when he was imposed with two punishments under the Armed Forces Act and then again had his service terminated under the QRRN. The learned High Court judge merely had the following to say:

> [15] On the charge made against the applicant under s 49(b) of the AFA the applicant contended double jeorpardy. From the facts it is clear that the charge against the applicant was premised on his refusal to obey the command of his superior which he in fact admitted. Hence there is no issue of him having to be court martial *(sic)* for the charge in question.

[21] The respondent appealed to the Court of Appeal against the High Court decision.

[22] For the record, there is now in force a uniform set of regulations on terms of service of regular forces, including the Navy. These are the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 which came into force on 26 June 2013, having been published in the *gazette* on 25 June 2013. Regulation 68 of the Regulations makes provision for the cessation of the application of the QRRN to the Navy.

AT THE COURT OF APPEAL

[23] Before the Court of Appeal only one issue was pursued, namely the issue of whether the QRRN still had the force of law (at the time of the respondent's termination from service).

[24] The Court of Appeal, in a majority decision, held that the QRRN were no longer valid law at the material time.

[25] The majority held that s 217(2) of the Armed Forces Act did not save the QRRN as the QRRN were not *made* under the Navy Ordinance but were only *applied* to the Navy under s 10 of the Navy Ordinance.

[26] It was the view of the majority that:

> [48] ... s 217(2), being a savings provision is very clear in its intention, which is to save all subordinate or subsidiary legislation *made under* the repealed enactments and ordinances set out in s 217(1), which in our case is the said Ordinance or the Navy Ordinance 1958.
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> [49] The words *'made under'* must be given its plain and ordinary meaning and cannot be extended to include regulations applied by s 10(1) of the said Ordinance. If it was the intention of the legislature to save such regulations they could have done so by adding the words 'or applied under' after the words *'made under'* in s 217(2) of the AFA.
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> [50] As the Queen's Regulations is punitive in nature in that it provides, inter alia, for the termination of service of members of theTLDM, it is imperative that the words in s 217(2) of the AFA be given a strict construction such that only regulations *made under* the said Ordinance are saved and not regulations applied by the said Ordinance.
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> [51] It would be straining the language of s 217(2) too much if the words *'made under'* is construed to mean 'applied under'.
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> ...
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> [54] In the case of the said Ordinance the regulations would be those made under s 16 of the said Ordinance. Section 16(1) confers power on the Armed Forces Council, with the approval of the Yang di-Pertuan Agong to make regulations to provide for, inter alia, the terms and conditions of service of officers and ratings of the Navy.

A [55] It is significant that the said Ordinance itself makes a distinction between regulations made under the said Ordinance and regulations applied by virtue of s 10. This can be seen in s 11 and para 3 of the First Schedule to the said Ordinance.

B [56] Section 11 of the said Ordinance provides that the Armed Forces Council may by order amend, adapt or repeal the First Schedule to this Ordinance, and any enactment *or regulation* applied to the Navy by s 10. Paragraph 3 of the First Schedule stipulated that all regulations made under s 16 shall be deemed to modify any enactment or regulation *applied under s 10* insofar as they conflict with the first mentioned regulations.

C [57] It can therefore be surmised that regulations made under s 16 and regulations applied by virtue of s 10 of the said Ordinance are different and treated differently by the said Ordinance.

D [58] In the circumstances it is our view that the repeal of the said Ordinance would mean that the regulations applied by s 10, which includes the Queen's Regulations, would by virtue of that repeal be also repealed.

E [59] It would be different, in our view, had the law, namely the said Ordinance, provide expressly that regulations applied by s 10 shall be deemed to be made under the said Ordinance. In such a situation, the regulations would fall within the scope of s 217(2) of the AFA and they would by virtue thereof remain enforceable.

F **[27]** The minority in the Court of Appeal however was of the view that the purposive approach advocated in s 17A of the Interpretation Acts 1948 and 1967 ('Act 388') should be applied. Applying the purposive approach, the minority view was that it could not be the intention of the Legislature to leave a lacuna in the legislation applying to the Navy on matters similar to those provided for in the QRRN as at the time of the repeal of the Navy Ordinance no regulations had been made to replace the QRRN under the Ordinance. As such, legislation applied under the Ordinance should be given the same force as legislation made under the Ordinance.

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H **[28]** The Court of Appeal thus, by a majority, allowed the appeal by the respondent and set aside the order of the High Court.

[29] The appellants appealed to this court.

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AT THE FEDERAL COURT

Leave question

[30] Leave was granted to the appellants on 17 June 2014 to appeal to this court against the decision of the Court of Appeal.

[31] The sole question of law for which leave was granted ('leave question') is as follows:

> Whether the termination of noncommissioned servicemen under the Queen's Regulations for the Royal Navy (QRRN) via the Naval Ordinance 1958 read together with section 217(2) of the Armed Forces Act 1972 is lawful and has the force of law in Malaysia.

Submissions by parties

[32] Before us, learned senior federal counsel submitted that the QRRN was written law within the meaning of that term as defined in s 3 of Act 388.

[33] Emphasis was placed on para (d) of the definition as a basis for learned senior federal counsel's submission that being subsidiary legislation applied under s 10 of the Navy Ordinance, the QRRN were written law.

[34] On the issue of whether that written law continued to have the force of law despite the repeal of the Navy Ordinance by the Armed Forces Act, learned senior federal counsel directed our attention to s 30 of Act 388 which, he submitted, saved the QRRN.

[35] Learned senior federal counsel submitted that by virtue of s 30(2)(a)(ii) of Act 388, the repeal of the Navy Ordinance by the Armed Forces Act did not affect the continued operation of the QRRN, which were regulations (written law) applied by the Navy Ordinance.

[36] With regard to the specific savings provisions in s 217(2) of the Armed Forces Act, learned senior federal counsel submitted that those specific provisions did not affect the continued operation of the QRRN due to the provisions of s 33 of Act 388.

[37] For the respondent it was submitted that what were saved under s 217(2) of the Armed Forces Act were regulations 'made under' the Navy Ordinance. As the QRRN were not made under the Ordinance but were only applied by the Ordinance to the Navy, the QRRN were not saved.

[38] Learned counsel for the respondent also submitted, echoing the majority view in the Court of Appeal, that s 217(2) of the Armed Forces Act should be given strict construction as the QRRN were punitive in nature.

[39] Learned counsel for the respondent disagreed with the view of the minority in the Court of Appeal that the QRRN needed to continue to be in force as without them no specific statutory provisions were in place to provide for the discipline and discharge of non-commissioned servicemen of the Navy.

[40] According to learned counsel for the respondent, there are some 117 provisions in Part V of the Armed Forces Act which deal with disciplinary issues, in particular s 90 which allows the service of a non-commissioned serviceman to be terminated.

ANALYSIS

[41] The issue for determination for the purpose of the leave question is whether the QRRN were saved when the Navy Ordinance was repealed by the Armed Forces Act.

[42] Section 217 of the Armed Forces Act 1972 reads as follows:

> 217 Repeal of existing enactment and ordinances
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> (1) The Malay Regiment Enactment, the Federation Regiment Ordinance 1952 [*Ord. 27 of 1952*], the Military Forces Ordinance 1952 [*Ord. 47 of 1952*], the Navy Ordinance 1958, the Air Force Ordinance 1958, the Territorial Army Ordinance 1958 [*Ord. 52 of 1958*], the Naval Volunteer Reserve Ordinance 1958 [*Ord. 55 of 1958*] and the Air Force Volunteer Reserve Ordinance 1958 [*Ord. 58 of 1985*], are hereby repealed:
> Provided that —
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> (a) all the armed forces raised under the provisions of the aforesaid enactment and ordinances shall be deemed to be raised under this Act; and
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> (b) all officers and servicemen serving with the armed forces raised under the provisions of the aforesaid enactment and ordinances on the appointed day shall be deemed to have been commissioned, appointed, enlisted or re-engaged, as the case may be, under this Act, but such officers and servicemen shall not be required to serve with the regular forces for a longer period than that for which they were required to serve at the time of their original commissioning, appointment, enlistment or re-engagement, as the case may be.
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> (2) Notwithstanding the provisions of the last foregoing subsection or the provisions of any written law to the contrary, all rules, regulations, orders and other instruments made under the enactment and ordinances hereby repealed, in so far as they are not inconsistent with the provisions of this Act, shall remain in force until specifically repealed.

Is sub-s 217(2) to be given strict literal interpretation?

[43] It is not in dispute that the QRRN were not made under the Navy Ordinance that was repealed by s 217(1) of the Armed Forces Act. They were applied to the Malayan (then) Navy under s 10 of the Navy Ordinance which provided as follows:

> 10(1) All the enactments and regulations for the time being in force in the Royal Navy shall, subject to the provisions of this Ordinance and in particular to the modifications set out in the Schedule to this Ordinance, apply to the officers and ratings of or serving with the Navy whether ashore or afloat or within or without the limits of the Federation.
>
> (2) Any power conferred on the Admiralty by any enactment or regulation applied by sub-section (1) and relating to the remission, suspension or commutation of any sentence passed by a court-martial or disciplinary court shall be exercised by the Yang di-Pertuan Agong.

[44] In the explanatory statement of the objects and reasons for the Navy Bill (which became the Navy Ordinance) presented to the Legislative Council of the Federation of Malaya, the Attorney General of the Federation of Malaya explained the reason for the proposed continued application, by *cl 10* of the Bill, of the enactments and regulations then in force in the Royal Navy, as follows:

> ... Since it is intended, however, that the Royal Malayan Navy raised under the provisions of the Royal Malayan Navy Ordinance (Cap 86) of the Colony of Singapore will, insofar as it is practicable to do so, be used as the nucleus of the new Royal Malayan Navy, special provision is made for the enlistment in the Federation Navy of officers and ratings of the Navy raised under the Singapore Ordinance.
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> 3. For this reason, inter alia, provision is made for the application to the Navy, with suitable modifications, of the provisions of the law relating to naval discipline in force in the United Kingdom, and which at present apply to the Navy raised under the Singapore Ordinance ...

[45] In other words, the enactments and regulations applied by s 10 of the Navy Ordinance were themselves applied to the Royal Malayan Navy raised under the Singapore Ordinance and, by virtue of s 10, made to continue to apply to the Navy raised under the Navy Ordinance.

[46] It is clear that the application to the Navy of the QRRN and other statutes then in force in the Royal Navy was a measure to ensure that there existed, and continued to exist until otherwise provided, the necessary legal provisions to regulate and administer the Navy and its personnel.

[47] It must have been envisaged that regulations would be made under s 16

of the Navy Ordinance to replace the QRRN. Unfortunately this was not done.

[48] Section 16 of the Navy Ordinance empowered the Armed Forces Council to make, with the approval of the Yang di-Pertuan Agong, regulations for various purposes. These regulations, when made, were deemed to modify any regulations applied under s 10 if the applied regulations 'conflict with the first mentioned regulations'. This was provided for in para 3 of the Schedule to the Navy Ordinance.

[49] Until the date of the repeal of the Navy Ordinance, no regulations were made under s 16 of the Ordinance to replace the QRRN or which could be deemed to have modified the QRRN.

[50] Thus, if the words of s 217(2) of the Armed Forces Act are to be read with a strictly literal approach (as was the approach taken by the majority in the Court of Appeal), then upon the coming into force of s 217 of the Armed Forces Act the mechanism providing for the termination of a non-commissioned serviceman of the Navy whose service was no longer required ceased to exist.

[51] The minority in the Court of Appeal took the view that a purposive approach must be used as without the QRRN there would be no regulations in place to deal with the termination of non-commissioned servicemen whose service was no longer required.

[52] While it is true, as submitted by learned counsel for the respondent, that there are ample provisions in the Armed Forces Act to deal with matters of discipline, including termination/discharge of non-commissioned servicemen, our close scrutiny of the Act shows that those provisions involve court-martials. These include s 90 of the Act mentioned by learned counsel for the respondent. This was not the case under the QRRN provision utilised in respect of the respondent in this case.

[53] Part V of the Armed Forces Act deals with enlistment and terms of service for the regular forces. Under s 28(3), a serviceman such as the respondent could only be discharged from service in pursuance of a sentence of a court-martial or where 'his discharge has been authorized by the competent authority in accordance with any regulations made under this Part'.

[54] Section 36 in the same Part V empowers the Armed Forces Council, with the approval of the Yang di-Pertuan Agong, to make regulations governing the enlistment of persons in the regular forces, and, among others, their discharge or dismissal from service.

[55] It was not in dispute that at the material time of the respondent's termination from service no regulations had been made under s 16 of the Navy Ordinance to provide for the termination of a serviceman in place of the provisions in the QRRN, and no regulations had been made under s 36 of the Armed Forces Act to provide for such termination. A

[56] In our view, s 217(2) of the Armed Forces Act must be read in the light of the other provisions of the Act (in particular sub-s 28(3) of the Act) and the Navy Ordinance, as well as the reasons why the QRRN were made applicable to the Navy and the fact of the absence of any regulations made under s 16 of the Navy Ordinance or under s 36 of the Armed Forces Act to replace them. B C

[57] What was obvious was that in the drafting of s 217(2) of the Armed Forces Act the fact that the only regulations in place in relation to the termination of navy servicemen were the QRRN, and that the QRRN were regulations applied to the Navy by s 10 of the Navy Ordinance but not made or deemed to have been made under the Ordinance, had been overlooked. In respect of the other branches of the armed forces, there were regulations, such as the Army and Air Force (Terms of Service) Regulations 1961, which had been made under the respective applicable Enactment and Ordinances (which Enactment and Ordinances were also repealed under s 217(1) of the Armed Forces Act). D E

[58] To interpret s 217(2) of the Armed Forces Act in a strictly literal manner in the circumstances of this case would certainly lead to the absurd consequence that a Naval serviceman, for want of regulations made under s 16 of the Ordinance or s 36 of the Armed Forces Act, could not, at the material time, be terminated from service except in pursuance of a sentence by a court-martial. That could not have been intended by Parliament. F G

[59] How then should the court interpret s 217(2) of the Armed Forces Act?

[60] The following words of Donaldson J in *Corocraft Ltd and another v Pan American Airways Inc* [1968] 2 All ER 1059 are quoted in *Bennion on Statutory Interpretation*, (5th Ed) at p 502: H

> The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issues forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. I

[61] Romer LJ in *Swan v Pure Ice Company, Limited* [1935] 2 KB 265 quoted the following passage from *Maxwell on the Interpretation of Statutes*, (7th Ed), p 217:

> They (ie, the authorities) would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does.

[62] In *Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors* [2007] 3 MLJ 305; [2007] 3 CLJ 230, Suriyadi Halim Omar JCA (as he then was), said:

> ... Maxwell in Interpretation of Statutes had occasion to quote the following passage from *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at p 1022:
>
> > ... Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. *At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result*. (Emphasis added.)

[63] We agree with the minority in the Court of Appeal that in the circumstances of this case, the court must, as exhorted by s 17A of Act 388, give to s 217(2) of the Armed Forces Act a construction that would promote the underlying purpose of that subsection: which is clearly to preserve the subsidiary legislation in force and applying to Navy servicemen at the time of coming into force of that subsection until such time as the subsidiary legislation is replaced under the Armed Forces Act.

[64] We note that under s 11 of the Navy Ordinance the laws applied under s 10 were treated as subsidiary legislation under the Ordinance, albeit not made under the Ordinance. This can be deduced from the fact that under s 11 of the Ordinance, they could be amended, adapted or repealed by an order made by the Armed Forces Council.

[65] In our considered view, the absence of the words 'as if made under this Ordinance' in s 10 of the Ordinance in relation to the QRRN and other subsidiary legislation being applied under s 10 did not place the QRRN and

the other subsidiary legislation on a different footing from subsidiary legislation made under s 16 of the Ordinance.

[66] It is also our considered view that the omission of the words 'or applied by' in s 217(2) of the Armed Forces Act does not detract from the clear intention of Parliament to 'save' all subsidiary legislation in force as at the date of the coming into force of the Armed Forces Act so long as the legislation is not inconsistent with the provisions of the Act.

Effect of ss 30 and 33 of Act 388 on the QRRN

[67] Learned senior federal counsel, as mentioned above, pointed us in the direction of ss 30 and 33 of Act 388 which, he submitted, save the QRRN.

[68] Sections 30 and 33 of Act 388 read as follows:

30 Matters not affected by repeal

(1) The repeal of a written law in whole or in part shall not —

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

(2) Without prejudice to the generality of subsection (1) —

(a) the repeal of a written law which adopts, extends or *applies* another *written law* shall not —

(i) invalidate the adoption, extension or application; or

(ii) *prejudicially affect the continued operation of the adopted, extended or applied law;* and

(b) the repeal of a written law which amends another written law shall not —

(i) invalidate the amendments made by the repealed law; or

(ii) prejudicially affect the continued operation of that other law as amended. (Emphasis added.)

...

A *Specific transitional and saving provisions to be without prejudice to sections 28 to 32*

33 Specific transitional or saving provisions included in a written law shall be without prejudice to the application of sections 28, 29, 30, 31 and 32 in respect of that law.

B

[69] These two provisions of Act 388 were not referred to or even alluded to in the judgements of the Court of Appeal. We presume that the Court of Appeal's attention was not drawn to these provisions.

C **[70]** First of all, we need to state that as the repeal and savings provisions under discussion are contained in an Act of Parliament enacted after 18 May 1967, it is Part I of Act 388 which applies (as provided for in s 2 of Act 388). Sections 30 and 33 are found in that Part.

D **[71]** It is not in dispute that the QRRN were subsidiary legislation and were still in force at the time the Armed Forces Act came into force on 1 June 1976. It is their continued operation thereafter that is the issue before us.

E **[72]** Section 3 of Act 388 defines 'written law' as follows:

'written law' means —

(a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;

F (b) Acts of Parliament and subsidiary legislation made thereunder;

(c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and

G (d) *any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof;* (Emphasis added.)

H **[73]** We therefore agree with learned senior federal counsel that the QRRN were written law within the meaning of that term as defined in s 3 of Act 388. Section 30(2)(a)(ii) of that Act therefore applied to the QRRN.

[74] The provisions of s 30(2)(a)(ii) of Act 388 clearly show that upon the I repeal of the Navy Ordinance which (by its s 10) applied the QRRN to the Navy, the continued operation of the QRRN was not prejudicially affected.

[75] There is however the problem of the specific saving provision in s 217(2) of the Armed Forces Act. When that provision saves *only* regulations

made under the Navy Ordinance, does it mean that the QRRN's continued operation was not saved? A

[76] This is where s 33 of Act 388 comes into play. Section 33 makes it clear that the specific savings provisions in the written law (which, in this context, is the Armed Forces Act 1972), 'shall be without prejudice to the application of sections 28, 29, 30, 31 and 32 in respect of that law'. B

[77] In the case of *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR 20, Chan Sek Keong CJ, had occasion to deal with the expression 'without prejudice' appearing in O 22A rr 9(5) and 12 of the Singapore's Rules of Court. His Lordship said: C

> The expression 'without prejudice' in a statutory provision ordinarily means that what follows in that provision (here, the factors to be taken into account) is not to impair the force of the existing provisions and is therefore not to override or repeal them (see *Public Prosecutor v Viran* [1947] 1 MLJ 62 at p 64 per Spenser-Wilkinson J). D

[78] In *Public Prosecutor v Viran* [1947] 1 MLJ 62, the accused was charged in the district court under the Arms Enactment for being in possession of a shot gun and under the rules made under s 5 of the Explosives Enactment, respectively. On the very day that the accused was before the district court, the Firearms and Ammunition (Unlawful Possession) Ordinance 1946 was *gazetted*. The district judge decided to frame charges under s 3 of the Ordinance which read as follows: E F

> 3 Without prejudice to the provisions of any written law in force in any part of the Malayan Union relating to unlawful possession of arms or ammunition, any person who shall, after the commencement of this Ordinance, be in unlawful possession of any firearm or ammunition shall be liable to imprisonment of either description for a term which may extend to ten years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine. G

As the 1946 Ordinance provided for a higher penalty for possession of arms and ammunition, the district court concluded that the provisions of the Arms Enactments and the rules made under the Explosives Enactment with regard to penalties for possession of arms and ammunition had been impliedly repealed. He then transferred the case to the magistrate's court for a preliminary inquiry to be held. The public prosecutor appealed against that order. Spencer-Wilkinson J, in discussing the interpretation to be given to s 3 of the 1946 Ordinance, said the following: H I

> It seems clear, therefore, that where the law provides, either in the same or different Enactments, for different penalties for the same offence that both or all of the provisions as to punishments are intended to stand side by side and that it is left to

A the proper authorities to decide under which of the different provisions the offender shall be prosecuted and punished.

The next question is whether this general rule is affected in this instance by the opening phrase of s 3 of Ordinance No 28. I think the meaning of the expression 'without prejudice' in the context is not really open to doubt. One meaning of the
B expression 'to prejudice' is 'to impair', and I read the words 'without prejudice to the provisions of any written law in force in any part of the Malayan Union relating to unlawful possession of arms or ammunition' as meaning that what follows is not to impair the force of any of the existing provisions and is therefore not to override or repeal them.

C

[79] In our view therefore, despite the QRRN not being mentioned in the specific savings provisions in s 217(2) of the Armed Forces Act, the QRRN's continued application (until specifically repealed or revoked under that Act) was preserved by virtue of s 33 of Act 388.

D

CONCLUSION

[80] Based on our analysis above, we answer the leave question in the following manner:

E

The QRRN applied by the Navy Ordinance 1958 continued to have the force of law notwithstanding the repeal of that Ordinance by s 217(2) of the Armed Forces Act 1972, until the QRRN are specifically repealed or revoked. Consequently, the termination of non-commissioned servicemen under the QRRN while the QRRN are still in force is lawful.

F

[81] We therefore allow this appeal and set aside the order of the Court of Appeal.

Appeal allowed.

G

Reported by Kohila Nesan

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